IN THE

Supreme Court of the United States

OCTOBER TERM, 1967
No. 357

MIRRO-DYNAMICS CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM.

The fallacy in the Government's position is epitomized in the last sentence of its argument; "Congress has created an exception to the general rule. . . ." The bald words of the statute clearly preclude this conclusion, since

(1) Congress has at no time created a statutory exception to the *Corn Products* rule enunciated in 1955, and

(2) Congress never used the words trader or investor in any legislation.

In any event there is nothing in the findings or conclusions of the district court (App. A to Petition) to the effect that plaintiff was a trader or investor, because there has been no trial or opportunity to present

evidence of intent or business activities. The district court never found as a fact that the securities in question were not held primarily for sale to customers in the course of the taxpayer's business and were for that reason capital assets. It merely concluded that because the taxpayer could not inventory securities as a merchant-dealer under Reg. §1.471-5, the securities were capital assets. On the other hand, the Court of Appeals labeled them capital assets without regard to the purpose for which they were held or whether they were inventoriable, since it concluded as a matter of law that the taxpayer could have no customers. The affidavit filed on behalf of the taxpayer recited that "at various times taxpayer's officers dealt directly with principals" [R. 259]. Thus, if the taxpayer did buy from and sell to others, it did have customers as a matter of law, despite the provisions of the Cal. Corp. Code cited by the U.S. in footnote 4, and it should have the opportunity to prove it rather than being given the short shrift of a Summary Judgment.

There is no doubt that there is a conflict between the *Chinook Inv.* decision and the authorities on which the U.S. relies. Only this Court can resolve the conflict in these decisions, created by the Government's position that the courts have consistently taken the position that the standard under §1221(1) and §471 is the same and that a different result can follow depending on whether the property held for sale is securities or real property.

The *Chinook* decision has never been overruled and is in conflict with both the district court and court of appeals' decisions below. It squarely rejects the Government's contention that only a §471 dealer's activi-

ties generate ordinary income or loss. Thus, the criterion set forth in the Regulations, §1.471-5, as to whether a taxpayer is a merchant in securities is irrelevant and immaterial in determining whether there is a trade or business with sales to customers. In any event that criterion is limited by the Regulations themselves to inventory determinations.

The Government attempts to perpetuate the confusion in the cases by implying (p. 3) that a dealer's activities are not "on his own account" while a speculator's are. The only statutory definition of dealer is contained in the Securities Exchange Act of 1934, 15 U.S.C.A. §78c(a)(5) and provides that a dealer "means a person engaged in the business of buying and selling securities *for his own account,* through a broker or otherwise. . . ." (Ital. added). Under this definition if the taxpayer were afforded its day in court, it may be able to prove that it was a dealer. **However, the pertinent provisions of the Internal Revenue Code do not turn on whether the taxpayer is a dealer.** The determination of whether plaintiff is entitled to carry back its operating losses turns on whether ordinary losses were generated from its business of buying and selling securities.

The decisions of this Court and the other decisions of the Ninth Circuit compel the conclusion that §1221 (1) does not allow for differences in interpretation as to the business or assets involved, whether real property or securities, and that if a taxpayer is in a trade or business and the only manner in which benefit is to be realized from the property is ultimate sale at a profit, then the acquisition and holding must be considered for sale to customers in the ordinary course of business.

There is no doubt that the authorities on which the Government relies do not withstand scrutiny and are no longer vital, as §1221(1) is in no sense of the word ambiguous and the legislative history cannot be used to tailor the statute to the facts of this case by interpreting it in different ways for real property as distinguished from securities, where the statute *is* general in its applicability.

Respectfully submitted,

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